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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 79A02-0602-CR-94
	)	
MICHAEL W. SMART,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Michael Morrissey, Judge
Cause No. 79D06-0204-FD-105

September 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

The State appeals the trial court's order that Michael W. Smart serve in community corrections' day-reporting program the balance of his four-year term originally ordered to be served in community corrections' house arrest program.

We reverse.

ISSUE

Whether the trial court lacked authority to order that the balance of Smart's four-year term in community corrections be served in its day-reporting program.

FACTS

On April 17, 2002, the State charged Smart with operating a vehicle while intoxicated (OWI) – as a class A misdemeanor *and* as a class D felony, based upon his having a prior conviction. It also charged him with being an habitual substance offender (HSO).

On June 11, 2003, Smart and the State submitted to the trial court a plea agreement. The written plea agreement specifically provided that Smart was pleading guilty to the charges, and his sentence would be "3 + 5 . . . years of which 5 . . . years shall be executed." (App. 24). After the "5" in the line stating that 5 years were to be executed is handwritten "1 DOC w/ credit time" and "4 HA w/o credit time." Id. Smart admitted to the trial court the factual basis for his plea of guilty to the charges, and the trial court accepted his plea. As explained by Smart's counsel, the plea agreement called for Smart to serve "three years on the D felony OWI enhanced by five years on the HSO," with "one year to the Department of Correction[] . . . followed by four years house

arrest, followed by" three years of probation. (Plea Hr'g Tr. 16). The trial court then stated that Smart was "being sentenced to a total of eight years of which one year is to be served in the Department of Correction[], four years to be served on house arrest," and then three years served on probation. Id. at 18. The trial court then repeated that Smart was ordered to serve "one year in the Department of Correction[], four years on house arrest," and three years on probation, and the written order mirrors those terms. Id. at 19.

On January 21, 2004, Smart filed a *pro se* motion for modification, asking to be "off house arrest" and placed on "the call-in program" or probation. (App. 30). Smart informed the court that "the 60 mile radius allowed by the house arrest program" limited his ability to support his family. (App. 31). The trial court denied his motion on January 27, 2004, noting that on December 8, 2003, it had entered an order granting to community corrections the "discretion to allow [Smart] to leave" the county "for employment purposes." (App. 33).

On March 1, 2004, counsel appeared for Smart. On March 30, 2004, the State filed a response objecting to any modification of the sentence originally imposed. On April 5, 2005, the trial court again denied Smart any modification of his sentence.

On September 26, 2005, Smart's counsel filed yet another petition asking the trial court to "modify the terms of his House Arrest commitment." (App. 48). The petition asserted that Smart had served his one-year executed sentence at the Department of Correction and had completed more than half of his "four (4) year House Arrest sentence," and that the "restrictions placed upon him as conditions of his House Arrest

commitment" had limited his "career opportunities" and income as "a single custodial father of a teenage daughter." (App. 48).

On October 24, 2005, Smart, his counsel, and the State appeared at a hearing on Smart's petition.[1] The trial court ordered community corrections to "review this cause and file recommendation [sic] for modification." (App. 52). The report from community corrections stated that while in the house arrest program for the past four months, Smart had not "receiv[ed] any write-ups or failed drug screens," and that community corrections "would not be opposed to the defendant serving his remaining time on Day Reporting." (App. 53). The trial court then ordered Smart to serve "the balance" of his four-year term in the house arrest program on day-reporting, with "all other" provisions of the sentencing order to remain "in full force and effect." (App. 54).

On November 28, 2005, the State filed a motion to correct error. The State asserted that having accepted the plea agreement, the trial court was bound by its terms – which "did not permit a later modification of sentence and specifically stated how the executed time was to be served." (App. 57). The State further asserted that day-reporting was a "less restrictive penalty" than the house arrest program agreed to in the plea agreement, and that the State had never agreed to such a modification to Smart's sentence. Id. The trial court held a hearing on the motion on January 9, 2006. The trial court observed that under Indiana Code section 35-38-2.6-5, if the person had violated

[1] No transcript of this hearing is submitted. The order of this date and the CCS simply indicate that the parties appeared and that the trial court ordered a report from community corrections and set a subsequent hearing date.

the terms of his community corrections placement, the trial court could change the terms of the placement. It reasoned that this could implicitly authorize a change of placement "if [the person had] done well." (Motion Hr'g. 6). The trial court further observed that trial courts were "under a great deal of pressure" from the Department of Correction and State government to "to put people in community corrections and reward [them] for doing well." Id. The trial court denied the State's motion to correct error.

DECISION

The State argues that the trial court was without power to modify Smart's sentence because it was imposed pursuant to the explicit terms of the plea agreement between Smart and the State. We agree.

In State ex rel. Goldsmith v. Superior Court, 275 Ind. 454, 419 N.E.2d 109 (1981), our Supreme Court explained that the "concept of plea bargaining contemplates an explicit agreement between the State and the defendant which is binding upon both parties when accepted by the trial court." Id. at 114.

> The prosecutor and the defendant are the contracting parties, and the trial court's role with respect to their agreement is described by statute: "If the court accepts a plea agreement, it shall be bound by its terms."

Pannarale v. State, 638 N.E.2d 1247, 1248 (Ind. 1994) (quoting Ind. Code § 35-35-3-3(3)). Once the trial court has accepted a plea agreement that recommends a specific sentence, the terms of that agreement constrain the discretion that the court would otherwise employ in sentencing. Id. Subsequent to the initial sentencing, the trial court has "authority to modify a sentence so long as the modified sentence would not have violated the plea agreement had it been the sentence originally imposed." Id. In other

words, when later requested by one party to modify the sentence imposed, it has no authority to modify any specific term previously agreed to by both parties to the plea agreement.

The terms of the plea agreement were that Smart would serve one year executed at the Department of Correction, followed by four years of house arrest, followed by probation. The trial court could not have originally sentenced Smart to serve only part of his four-year term at community corrections in its house arrest program – because the parties had specified in the plea agreement that Smart would serve the entire four-year term in that program. Therefore, the trial court lacked the authority to later modify that agreed term.

We reverse.

RILEY, J., and VAIDIK, J., concur.